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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 136

HARE TRUST, AN EXPRESS TRUST, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 27–35) is unreported. The opinion of the Court of Appeals (R. 83–84) is reported at 126 F. (2d) 530.

JURISDICTION

The judgment of the Court of Appeals was entered March 9, 1942 (R. 84). Petition for a writ of certiorari was filed June 9, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of

the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the taxpayer trust during the years 1933 and 1934 was an association within the meaning of Section 1111 (a) (2) of the Revenue Act of 1932 and Section 801 (a) (2) of the Revenue Act of 1934, taxable as a corporation.

2. If the taxpayer was taxable as a corporation, then whether the Board erred in denying the taxpayer's motions—filed after the Board had promulgated its findings of fact and opinion upon the issue tried before it—for further hearing so that taxpayer might introduce proof upon questions which it had not put in issue at the trial.[1]

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved, so far as the year 1934 is concerned, are the same as those set forth in our brief in the companion case of *Second Carey Trust* v. *Helvering,* No. 135. The corresponding provisions of the Revenue Act of 1932, applicable to the tax year 1933, are for present purposes identical with the provisions of the 1934 Act.

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[1] These questions are similar to the questions involved in the companion case of *Second Carey Trust* v. *Helvering*, No. 135, in which petition for certiorari was filed concurrently with the petition herein. In the court below it was recognized that this case should abide the result in the *Second Carey Trust* case (R. 84).

STATEMENT

The pertinent facts, including those found by the Board (R. 28–32), may be summarized as follows:

Taxpayer was organized as an "express trust" under Oklahoma law on August 13, 1932 (R. 28). Upon that date the Royalty Service Corporation, Ltd., conveyed to the Southwest Company, an express trust, *in trust,* an undivided 7/48ths interest in the 7/8ths working interest of a certain oil and gas lease on land in Oklahoma County, Oklahoma, in consideration of $1 and the issuance to the grantor of 800 certificates of beneficial interest in the trust thereby created, known as the "Hare Trust" (R. 28). The interest so conveyed was "to be owned, held, managed, operated and handled by the Trustee" for the benefit of the holders of the certificates of beneficial interest (R. 57), and the trust instrument provided that the trust should cover not only the property then conveyed "but also all other property, if any, hereafter conveyed by any one to Hare Trust" (R. 28, 57). The trustee, at its option, had the right to acquire, take or hold any other property for the benefit of the trust and subject to the terms and provisions of the trust (R. 28, 57).

The taxpayer was to continue for a period of twenty-one years, but might be liquidated prior to that time at the direction of the grantor (if at that time the owner of any beneficial units) and the owners of two-thirds of the beneficial units (R. 28).

All units, or certificates for them, were transferable only on the books of the trustee upon surrender of the certificate properly endorsed (R. 29, 59).

The instrument further provided that the grantor, regardless of the number of units which it owned, or any bona fide owner of 300 or more units might at any time elect in writing to surrender to the trustee for cancellation its units in the trust and take in lieu thereof a proportionate undivided share of the property of the trust without affecting the trust as to the remaining unit holders (R. 31, 61–62). At some date not shown by the record Royalty Service Corporation, Ltd., surrendered 400 units of beneficial interest to taxpayer's trustee and received for them an undivided interest in the trust property (R. 48). Thereafter taxpayer owned only a 7/96ths interest of the 7/8ths interest in the lease.

There was one producing well on the property when the trust was created, and no other wells were brought in during the years 1933 or 1934 (R. 29). The producing well was operated by the Phillips Petroleum Company under an operating contract with Royalty Service Corporation. Taxpayer owned a proportionate interest in the operating machinery and equipment. The working interest of the lease was operated for its benefit and taxpayer paid its proportionate share of the operating expenses and the costs incident to any new equipment. Taxpayer checked each bill as it came in and could object to it if unsatisfactory (R. 29).

The provisions of the Hare Trust instrument, save as above set forth, are in other respects similar to the provisions of the instrument creating the Second Carey Trust.

Taxpayer filed its income tax returns for the years 1933 and 1934 as a trust on form 1040. It did not file capital stock tax returns. The income tax return for each year showed a loss. Among the deductions taken from gross income, in each return, was a deduction for "distribution to unit holders" and a deduction for "depletion" or for "depletion and depreciation". The Commissioner determined a deficiency against the taxpayer for each year, treating it as an association taxable as a corporation, disallowing the distributions to unit holders upon the ground that they were dividends, and allowing percentage depletion for 1933 but no depreciation or depletion for 1934 (R. 13, 23, 31–32). The Commissioner computed the excess profits tax on the income as determined by him without any allowance of 12½ percent of a declared value of taxpayer's capital stock (R. 32).

Taxpayer tried its case to the Board upon the issue whether it was an association taxable as a corporation or was a trust whose distributable income was taxable to its beneficiaries. It offered no evidence to show that it was entitled to any depreciation and the Board observed (R. 33) that there were no facts of record upon which it could determine depreciation. As the Commissioner had allowed taxpayer percentage depletion for 1933 (in

the amount of 27½ percent of gross income) and taxpayer had offered no evidence to show error in that allowance the Board upheld the Commissioner's determination on that point. The Board then allowed percentage depletion for 1934. As taxpayer had not proved it filed a capital stock tax return or paid a capital stock tax, the Board denied taxpayer a credit for value of capital stock in the computation of its excess profits tax (R. 33–34). After the Board promulgated its findings and decision the taxpayer filed a motion for rehearing, reconsideration, and further hearing, and still later a motion to vacate the Board's memorandum findings of fact, opinion, and decision, to grant a new trial or a further hearing, and to make additional findings (R. 35–37, 38–40). These motions were denied (R. 37, 40), as were the substantially similar motions in the *Second Carey Trust* case.

The Court of Appeals affirmed the decision of the Board (R. 84).

ARGUMENT

The Court of Appeals correctly affirmed the decision of the Board. Since the questions presented here are substantially identical with the questions presented in the companion case, *Second Carey Trust* v. *Helvering,* No. 135, October Term, 1942, we refer to our brief in opposition in No. 135 for a more complete discussion of the issues.

CONCLUSION

The decision below is in accord with applicable decisions of this Court. The Court of Appeals did not err in refusing to order a rehearing and further trial before the Board of Tax Appeals. There is no conflict of decisions. It is respectfully submitted that the petition should be denied.

CHARLES FAHY,
Solicitor General.
SAMUEL O. CLARK, JR.,
Assistant Attorney General.
SEWALL KEY,
WARREN F. WATTLES,
Special Assistants to the Attorney General.

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